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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 United States of America,

10 Plaintiff,

11 v.

12 Wendy Barahona-Panameno,

13 Defendant.  
14

No. CR-22-02283-001-TUC-RM (JR)

**ORDER**

15 Pending before the Court is the Government's Motion in Limine to Preclude  
16 Necessity Defense (Doc. 69), to which Defendant Wendy Barahona-Panameno responded  
17 in opposition (Doc. 70).

18 **I. Legal Standard**

19 To establish a defense of necessity, a defendant must show: (1) she was "faced  
20 with a choice of evils and chose the lesser evil"; (2) she "acted to prevent imminent  
21 harm"; (3) she "reasonably anticipated a direct causal relationship between [her] conduct  
22 and the harm to be averted"; and (4) she "had no legal alternatives to violating the law."  
23 *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1991). Although a defendant "has  
24 the right to have a jury resolve disputed factual issues," a trial judge need not submit the  
25 necessity defense to the jury where "the evidence, even if believed, does not establish all  
26 of the elements of [the] defense." *United States v. Dorrell*, 758 F.2d 427, 430 (9th Cir.  
27 1985). A judge should grant a motion in limine to preclude evidence of necessity if the  
28 defendant's "offer of proof is deficient with regard to any of the four elements" of the

1 defense. *United States v. Aguilar*, 883 F.2d 662, 693 (9th Cir. 1989), *superseded by*  
 2 *statute on other grounds as recognized in United States v. Gonzalez-Torres*, 309 F.3d 594  
 3 (9th Cir. 2002).

## 4 **II. Facts**

5 Defendant argues that she is entitled to assert the necessity defense at trial based  
 6 on the following facts: Defendant encountered a group of individuals waving down cars  
 7 on the side of a desert road at approximately 5 a.m. (Doc. 70 at 1, 5.) After picking up  
 8 the individuals in her minivan, Defendant turned into the Emergency Department  
 9 entrance of the Canyon Vista Medical Center in Sierra Vista—at a time when she was  
 10 being followed by a Cochise County Sheriff’s Deputy but before the Deputy had  
 11 activated the overhead lights in his vehicle. (*Id.* at 2, 5.) After the Deputy pulled  
 12 Defendant over, he did not inquire as to the health of any of the individuals in the  
 13 minivan. (*Id.* at 2, 5.) When the individuals were later deposed, one of them testified  
 14 that a person in the group couldn’t breathe very well. (*Id.* at 3.) Another testified that,  
 15 about eight months before crossing the border, he began having a problem with one of his  
 16 nostrils not filling with air, and that it was possible other people could have heard him  
 17 having difficulty breathing. (*Id.* at 3-4.) Defendant states that she anticipates testifying  
 18 to why she stopped, the observations she made, and the imminent harm that necessitated  
 19 her to transport the individuals to the medical center. (*Id.* at 5.)

20 The Government argues that there is no indication that any of the undocumented  
 21 noncitizens that Defendant transported were visibly in medical distress, nor any evidence  
 22 that Defendant was aware when she picked the individuals up that one had an underlying  
 23 medical condition that affected his breathing. (Doc. 69 at 5.) The Government further  
 24 argues that it is undisputed that Defendant had a working phone at the time she picked up  
 25 the undocumented noncitizens, and she therefore could have called 911 as a legal  
 26 alternative to transporting the individuals. (*Id.*)

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1           **III. Discussion**

2           The Court finds that, even if believed, the evidence identified by Defendant is  
3 insufficient to establish all the elements of the necessity defense. The Court has reviewed  
4 the transcript of the deposition of the undocumented noncitizen with the underlying  
5 medical condition that affected his breathing. Although the individual testified that he  
6 was having a little problem breathing when Defendant transported him, and that it was  
7 possible other people could hear that his breathing was not normal, he did not testify that  
8 he was in imminent medical distress. To the contrary, he testified that he had been  
9 having a problem with one of his nostrils for eight months. He also testified that  
10 Defendant did not directly speak to him when he entered her vehicle. There is no  
11 evidence that Defendant asked him about his breathing or inquired as to whether he  
12 needed medical assistance. Accordingly, the Court finds there is insufficient evidence to  
13 show that Defendant acted to prevent imminent harm. Furthermore, Defendant had a  
14 working phone with her at the time of the incident and therefore could have called 911  
15 instead of picking up the group of undocumented noncitizens. Accordingly, Defendant  
16 has failed to identify evidence showing she had no legal alternatives to violating the law.

17           **IT IS ORDERED** that the Government's Motion in Limine to Preclude Necessity  
18 Defense (Doc. 69) is **granted**. Defendant shall be precluded from presenting a necessity  
19 defense at trial.

20           Dated this 29th day of August, 2023.

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25           Honorable Rosemary Márquez  
26           United States District Judge  
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